No. 80-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTION PRESENTED

Whether meals and lodging furnished without charge to employees for the convenience of their employer, and therefore admittedly not "wages" subject to withholding for Federal income tax purposes, are nonetheless "wages" subject to social security (FICA) and Federal unemployment insurance (FUTA) taxes.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 624 F.2d 701, is reproduced in its entirety as Appendix A to the petition for certiorari. The order reviewed below, of the United States District Court for the Southern District of Texas, issued without opinion and not reported, is reproduced in its entirety as Appendix B to the petition for certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 22, 1980. A petition for

certiorari was filed on November 14, 1980, within ninety days of the entry of this judgment. The order allowing certiorari was filed on January 19, 1981. (J.A. 141a)[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 3101, 3102, 3111, 3121, 3301, 3306, 3401 and 3402 of the Internal Revenue Code of 1954 (26 U.S.C. (1971 ed.)), and of Treasury Regulations on Employment Tax §§ 31.3121 (a)-1, 31.3306(b)-1 and 31.3401(a)-1 (26 C.F.R.) are set forth in an Appendix to this brief.

STATEMENT OF THE CASE

This action was brought by the petitioner, Rowan Companies, Inc. ("Rowan"), in the United States District Court for the Southern District of Texas, under 28 U.S.C. § 1346, for refund of Social Security (FICA) and Federal Unemployment Insurance (FUTA) taxes alleged to have been wrongfully assessed and collected from Rowan by the Internal Revenue Service.

The essential facts are undisputed. During the years in issue—1967, 1968, and 1969—Rowen owned and operated a number of land-based and offshore oil and gas drilling rigs (J.A. 5a-6a, 9a-10a, 22a, 42a, 73a-74a, 81a-85a; Cert. App. A, 2a).[2] It operated its land-based rigs with a crew which normally worked six

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[1] "J.A." references are to the Joint Appendix filed herein.

[2] "Cert. App." references are to the appendices contained in the petition for certiorari.

days a week on a seven or eight-hour shift, with each man going home at the end of his shift each day (J.A. 69a-70a). By contrast, Rowan's offshore rigs were operated up to sixty miles offshore; it was not practical for the offshore crews to leave at the end of each shift and consequently two crews were kept at the rig at all times, with each crew working a twelve-hour shift for ten consecutive days; every five days one of the crews went ashore for five days off and meanwhile a new crew came to the rig (J.A. 47a-48a, 59a, 69a-70a, 117a-118a; Cert. App. A, 2a-3a). Because of the cost of transporting crews to and from shore at the start and end of each shift, lodging at the rig and three meals a day at the rig cafeteria style were provided at Rowan's expense for each crew member for each of the ten days he remained aboard (J.A. 50a, 59a, 61a-62a, 87a, 106a, 120a-121a, 125a-126a, 136a, 139a-140a; Cert. App. A, 2a). Each member of each crew was furnished a meal before and after his shift and a third meal on a staggered basis in the middle of his shift (J.A. 128a-129a). The cost to Rowan of providing transportation ashore at the beginning and end of each shift—typically two hours in and two hours back—would have been $275 to $350 per day for each crew or roughly $25 per man, as compared to a cost to Rowan of about $6 per day per man for providing such meals and such lodging at the rig (J.A. 125a-126a, 136a, 139a-140a, 31a-32a). When a crew was off duty, its members were not expected to perform any services, nor was a crew member expected to assist in any work at his own mealtime (J.A. 130a-131a, 139a-140a).

Rowan's employees were not unionized and there was no agreement with them individually or collectively to

furnish food and lodging (J.A. 74a, 122a-123a, 139a-140a; Cert. App. A, 2a). The type of food and lodging furnished was the same for all crew members, irrespective of pay scale, and for all employees of other employers working on the drilling rig (with reimbursement to Rowan by such employers) (J.A. 139a-140a, 33a-34a, 62a-63a, 73a-74a, 80a-85a; Cert. App. A, 2a). They got no cash allowances if they refused such meals or lodging and Rowan was not obligated to furnish transportation to and from shore except at the time of crew changes (J.A. 125a-126a, 139a-140a; Cert. App. A, 2a). No meals or lodgings were provided to crew members during their off duty days and they had to obtain meals and maintain regular lodging ashore at their own expense.

Although paid substantially the same cash wages, crew members on Rowan's land-based rigs, who went home each day, were not furnished meals or lodging (J.A. 69a-70a, 47a-48a, 53a).

Rowan did not include the value of meals and lodging furnished the offshore employees in computing an employee's wages for purposes of income tax withholding or FICA or FUTA tax purposes.

The Government concedes that such offshore meals and lodging were furnished for the convenience of taxpayer as an employer and accordingly do not constitute "wages" subject to income tax withholding (Cert. App. A, 3a).[3] Nevertheless, the Government asserts that the meals and lodging are "wages" for FICA and FUTA tax purposes, and it assessed a deficiency against Rowan based on including a fair market value of $6 per

[3] See also Brief for the United States on Petition for a Writ of Certiorari, p.2, fn.2.

day per man for such meals and lodging in the base for withholding employee FICA tax and computing employer FICA and FUTA tax (J.A. 5a-6a, 9a-10a, 12a-15a, 31a-32a; Cert. App. A, 3a). Rowan paid such taxes and thereafter, after filing timely claim, filed this suit for refund of such taxes (Cert. App. A, 3a).

The district court granted a Cross-Motion for Summary Judgment filed by the Government, and the court below affirmed (Cert. App. A, 1a; B, 13a).

SUMMARY OF ARGUMENT

For over sixty years, meals and lodging furnished to employees for the convenience of their employer have been consistently treated in rulings and cases as non-compensatory and therefore not within the definition of "wages" subject to income tax, or (since adoption of income tax withholding in 1942) "wages" subject to income tax withholding.

When FICA and FUTA taxes were initially imposed on "wages" in 1935, the first regulations issued by the Internal Revenue Service specifically recognized that meals and lodging for the convenience of the employer are similarly not "wages" for such purposes. The court below found, however, that, by reason of so-called "facilities or privileges" regulations issued by the Internal Revenue Service in 1940, such meals and lodging are now "wages" subject to FICA and FUTA tax. The court below disregarded the fact that despite ambiguous and confusing language in the 1940 regulations, the Service continued to recognize the applicability of the convenience of the employer test for FICA and FUTA tax purposes off and on until at least 1962. The court below further disregarded a clearly expressed

Congressional intent when income tax withholding was first adopted in 1942 (and restated as recently as 1978) that for reasons of administrative convenience to both taxpayers and the Government, the "wage" base for FICA, FUTA and income tax withholding should be construed and applied identically.

The court below further failed to follow decisions of this Court as to the limited meaning of the term "wages" for tax purposes and as to the absence of administrative authority to change the meaning of such term by regulations. In addition to being without valid precedent and contrary to recent decisions of two other circuits and the Court of Claims, the court below also erroneously failed to follow other applicable regulations and rulings of the Internal Revenue Service still in effect, excluding meals and lodging furnished under the circumstances of this case from "wages" for FICA and FUTA tax purposes.

ARGUMENT

NONCOMPENSATORY MEALS AND LODGING FURNISHED TO EMPLOYEES FOR THE CONVENIENCE OF THEIR EMPLOYER ARE NEITHER INCOME NOR WAGES TO THE EMPLOYEES

I. Meals And Lodging Furnished For The Convenience Of The Employer Are Not Compensation To The Employees.

Meals and lodging furnished employees by their employers for the employers' convenience have been consistently regarded since 1919 as noncompensatory in nature and accordingly not income to employees for Federal income tax purposes. Thus, even though the Revenue Acts as early as 1918 specifically defined income as including "wages . . . of whatever kind and in whatever form paid" (Section 213, Revenue Act of 1918, 40 Stat. 1057), the regulations and rulings issued

by the Bureau of Internal Revenue as early as 1919 directly recognized that such term did not include the value of "board" or "living quarters . . . furnished to employees for the convenience of the employer." Reg. 45, Art. 33 (1919); O.D. 265, 1 Cum. Bull. 71 (1919); O.D. 514, 2 Cum. Bull. 90 (1920). This principle was repeatedly reiterated by the Government in rulings and regulations in the 1920's, 1930's, and 1940's and—as recently pointed out by this Court in *Commissioner* v. *Kowalski,* 434 U.S. 77 at 88, fn. 21 (1978)—also received during this period the repeated approval of the courts. The antecedents and scope of this "convenience of the employer" doctrine were explored in detail by this Court in *Kowalski,* with the following statement noted from the Tax Court's opinion in *Van Rosen* v. *Commissioner,* 17 T.C. 834 (1951), as to the reason for the resulting exclusion:

> "The better and more accurate statement of the reason for the exclusion from the employee's income of the value of subsistence and quarters furnished in kind is found, we think, in *Arthur Benaglia,* 36 B.T.A. 838, where it was pointed out that, on the facts, the subsistence and quarters were not supplied by the employer and received by the employee 'for his personal convenience[,] comfort or pleasure, but solely because he could not otherwise perform the services required of him.' In other words, though there was an element of gain to the employee, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and

> needs of the employee were satisfied was plainly secondary and incidental to the employment." 434 U.S. at 89, fn.21.

In *Rowan's* case, the alternative to providing employees with on-site meals and lodging at a cost of $6 per day per man, namely, transporting the men ashore at the beginning, middle and end of each shift at a cost of $25 per man and transportation time of 2 hours per transit, establish that the meals and lodging furnished by Rowan were for its own convenience and thus did not constitute income to its employees. This has been admitted by the Government (Cert. App. A, 3a), consistent with its recognition that a showing of employer necessity satisfies the "convenience" test, a recognition first generally articulated by the Government in 1921:

> "Where, from the location and the nature of the work, it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer, the value of such lodging and sustenance may be considered as being furnished for the convenience of the employer and need not, therefore, be included in computing net income of the employees." O.D. 814, 4 Cum. Bull. 84.

Other examples of employer necessity are set forth in the current regulations under Section 119, the 1954 codification of the convenience of the employer doctrine.[4] Thus, as of the enactment of the Social Security

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[4] Reg. § 1.119-1(a)(2)(ii). Such examples include the need to have employees available for emergency call, a need for short meal periods because of the nature of the employer's business, and the unavailability of alternate meal sources. Prior to enactment of Section 119, the Revenue Acts consistently defined taxable income as including "wages", but meals and lodging for convenience of

Act (49 Stat. 636) in 1935, meals and lodging furnished for the employer's convenience were neither (1) compensation, (2) wages, nor (3) income, to the employee for federal tax purposes.

II. The Four Employment Taxes Are Only Imposed On "Wages."

A. "Wages" has the same general meaning for all employment taxes.

The House and Senate Reports [5] to the 1935 Social Security Act described the three employment taxes then enacted as:

> (1) "an income tax, measured by a certain percentage of wages . . . levied on most wage earners" (employee's share of social security tax to be withheld from wages by employers);
>
> (2) "an excise tax, measured at the same rates on wages paid, . . . levied on employers" (employer's share of social security tax); and
>
> (3) "an excise tax . . . levied on employers . . . measured by . . . wages" (unemployment tax).

"Wages" was defined in the Act [6] to be "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash" [7] and has been described by this Court as being a "well

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the employer had been repeatedly held nontaxable by the Internal Revenue Service and the courts. The 1954 Code codified this rule for the first time.

[5] H.R. Rep. No. 615, S. Rep. No. 628, 74th Cong., 1st Sess. (1935).

[6] Sections 811(a) (relating to social security tax) and 907(b) (relating to unemployment tax).

[7] The statutory definition of "wages" is virtually identical today. See Appendix, *infra*, pp. 2a-3a.

understood word." *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369 (1946). That the Government recognized the applicability of the income tax rules to the newly enacted social security and unemployment taxes is shown by Regulations 90, promulgated in 1936 (relating to unemployment (FUTA) tax) which provided:

> "Ordinarily, facilities or privileges (such as . . . cafeterias, restaurants . . .), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely *as a convenience to the employer* or as a means of promoting the health, good will, contentment, or efficiency of his employees." (Emphasis added.)

The Revenue Act of 1942 added a fourth "employment" tax with the imposition on employers of an income tax withholding responsibility based on "wages" paid employees.[8] The Committee reports reflect clearly the Congressional intent that the term "wages" was to have the same general coverage and exclusions for income tax withholding as existed for social security tax purposes:

> "*With certain specified exceptions,* the term is defined to include all remuneration whether designated as salary, wages, fees, commissions, etc., and whether paid in cash or property, if paid for services performed by an employee for his employer . . . [*t*]*hese exceptions are identical with*

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[8] The Victory Tax provisions of the Revenue Act of 1942 (56 Stat. 884) added to the Internal Revenue Code of 1939, Sections 465 to 470 (effective from January 1 to June 30, 1943), and the Current Tax Payment Act of 1943 (57 Stat. 126) added to the Code Sections 1621-1632 (effective on a permanent basis July 1, 1943).

> *the exceptions extended to such services for Social Security tax purposes and are intended to receive the same construction and have the same scope.*" (Emphasis added.) S. Rep. No. 1631, 77th Cong., 2d Sess. 166 (1942).[9]

The stated reason was to:

> "simplify the process of collection at the source and help to minimize the requirements for additional business machines by employers charged with the duty of collecting and accounting for the tax." S. Rep. No. 1631, *supra* (1942), at 171.

Congress reiterated in 1943 its intent that the two withholding systems, income tax and social security, should be coordinated:

> "The Senate bill adopts the basic system of collection at source as provided in the House bill but makes a number of technical changes which are explained below. Under the bill as passed by the Senate, the methods of collection, payment, and administration of the withholding tax [on income] were coordinated generally with those applicable to the Social Security tax imposed on employees under section 1400 of the code. This proposal was made in order to facilitate the work of both the Government and the employer in administering the withholding system." (Conference Report, Current Tax Payment Act of 1943, H.R. Rep. No. 510, 78th Cong. 1st Sess., May 28, 1943 at 28.)

The statutory definition of "wages" that confronted Rowan in the years in suit—1967, 1968 and 1969—

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[9] See also H.R. Rep. No. 2333, 77th Cong., 2d Sess. 126 (1942). As set forth at p. 16, *infra*, the Internal Revenue Service immediately thereafter declared that meals and lodging furnished for the convenience of the employer were not "wages" subject to income tax withholding, and that continues to be its position until the present time.

and that has placed the instant case before this Court is the same as it existed in 1943 and is the same today. Employment taxes were owed by Rowan on "wages" paid by Rowan to its employees, with "wages" defined for income tax withholding purposes in Section 3401 as "all remuneration . . . for services performed by an employee for his employer," and—as recognized by the court below (Cert. App. A, 4a (fn.3), 6a)—defined in essentially identical terms for FICA and FUTA tax purposes in Section 3121 and 3306 as "all remuneration for employment." (App., *infra* p. 2a.) At no time has Congress indicated in any way that, in the absence of specific statutory language, the general term "wages" was to have a different meaning for the several employment taxes. In fact, as recently as 1978, floor debates showed a clear Congressional understanding that an item determined not to be "wages" for income tax purposes was, as a general principle, to be similarly excluded from "wages" for FICA and FUTA tax purposes.[10] In spite of this absence of

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[10] In 1978, Congress amended Section 119 so as to make clear that the exclusion applies to meals furnished an employee for the convenience of the employer, even if the employer imposes a partial charge for the meal. H.R. 12841, 95th Cong., 2d Sess., Section 4, enacted into law as P.L. 95-427. In the consideration of the bill on the floor of the Senate, the following colloquy between Senators Dole and Long occurred (Cong. Rec. S12367 (daily ed. Aug. 2, 1978)):

> "[Mr. Dole]. Madam President, I have one brief question I would like to address to the distinguished floor manager of the bill.
>
> "I have a question regarding section 4 of the bill. Am I correct that to the extent the value of meals and lodging is excluded from gross income, such item also is excluded from the definition of 'wages' for the purpose of income tax with-

statutory change in the definition of "wages" and an unmistakable Congressional intent that the term "wages" has the same meaning for all employment taxes, the Government asserts that it has the authority to treat meals and lodging furnished employees for the convenience of the employer as "wages" for FICA and FUTA tax purposes notwithstanding its recognition that such items are not "wages" for income tax withholding purposes. In evaluating the correctness of this assertion, this Court should be aware of the historical inconsistency in the Government's treatment for FICA and FUTA tax purposes of employer furnished meals and lodging.

B. The Government has recognized that noncompensatory meals and lodging are not "wages" for employment taxes.

As previously noted,[11] immediately after the enactment of the 1935 Social Security Act, the Treasury promulgated Regulations 90 recognizing the applica-

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holding, social security (or FICA) tax, and unemployment (or FUTA) tax?

"Mr. Long. Yes. Due to the special circumstances which the bill addresses, an item excluded from gross income will also be excluded from the definition of 'wages' for all payroll tax purposes, as you have suggested."

Section 4 of P.L. 95-427 makes no changes to the Code other than to Section 119, clearly indicating that under existing law, to the extent an item is excluded from gross income under Section 119, it is understood by Congress that such item is also excluded from "wages" for employment tax purposes. Astonishingly, the court below cites Senator Long's statement as indicating an awareness by "some members of the Congress" that the FICA and FUTA regulations interpreted "wages" differently than the regulations applicable to income tax withholding. Cert. App. A, 10a (fn.10).

[11] See p. 10, *supra*.

bility of the convenience of employer doctrine to unemployment tax (FUTA) "wage" determinations. Such a contemporaneous expression of opinion has been noted by this Court as being "highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute," and as such, "entitled to serious consideration." *White* v. *Winchester Country Club,* 315 U.S. 32, 41 (1942). In 1937, the Bureau of Internal Revenue issued S.S.T. 110, 1937-1 Cum. Bull. 440, holding that "supper money" paid an employee who worked overtime for the convenience of the employer did not constitute "wages" for purposes of social security (FICA) and unemployment (FUTA) taxes. Significantly, the Bureau cited as authority for its decision in S.S.T. 110 its previous *income tax* ruling, O.D. 514, 2 Cum. Bull. 90, issued in 1920, which held (though "wages" were within the statutory definition of "income")[12] that "supper money" furnished for the convenience of the employer did not constitute income to the employee for income tax purposes. S.S.T. 192, 1937-2 Cum. Bull. 449, was later issued in 1937 and provided that lunches served employees could constitute "wages" for FICA and FUTA purposes. However, this ruling was superseded the next year by S.S.T. 302, 1938-1 Cum. Bull. 456, which held that, if furnished for the convenience of the employer, such meals would *not* constitute "wages" for FICA and FUTA tax pur-

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[12] See p. 6, *supra.*

poses,[13] citing as authority Reg. 90, Art. 207, *supra;* Reg. 91, Art. 14; and S.S.T. 110, *supra.*

In 1940, prior to the enactment of income tax withholding, Regulations 106 and 107 were issued, in which the Treasury attempted to eliminate the exclusion from "wages" for FICA and FUTA tax purposes, of meals served for the convenience of the employer. Regulations 106, Section 402.227, and Regulations 107, Section 403.227, contained identical language on this point, which, after providing that "facilities or privileges" furnished employees do not ordinarily constitute remuneration for employment, stated:

> ". . . The term 'facilities or privileges,' however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees . . . , since generally these items constitute an appreciable part of the total remuneration of such employees."[14]

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[13] The holding in S.S.T. 302 that FICA and FUTA taxes would not apply referred to the following facts:

> "The M Company has now established that the free lunch privileges are afforded solely to promote its own interests; that the wage scale of its employees has not been lowered to reflect the value of such items; that the lunches are not furnished as additional compensation for services; that such lunches are voluntarily offered to the employees; and that the lunches are furnished for the convenience of the M Company, and benefit the company by promoting the health, good will, and efficiency of its employees."

All of these circumstances apply here to Rowan.

[14] This same language has been in the succeeding regulations to the present time. See Reg. § 31.3121(a)-1(f) (FICA) and Reg. § 31.3306(b)-1(f) (FUTA). These regulations are sometimes referred to as the "facilities or privileges" regulations. Note, however, that as late as 1957, the Service, citing the "facilities or privileges" regulations (relied on by the Court below), upheld the continued validity of S.S.T. 302, applying the "convenience of employer" exclusion for FICA and FUTA tax purposes. Rev. Rul. 57-471, discussed at pp. 17, 33, *infra.*

As was true in the case of the social security and unemployment tax statutory provisions, the income tax withholding provisions of Section 1621 enacted by the Current Tax Payment Act of 1943 did not specifically refer to meals or lodging furnished employees. As previously noted,[15] Congress deliberately chose to use the same tax base of "wages" for income tax withholding as it had used for social security (FICA) and unemployment (FUTA) tax purposes, and to define such term "wages" in essentially identical terms. Regulations 115, Section 404.101, promulgated by the Treasury in 1943, adopted the convenience of the employer test to determine the taxability of meals and lodging for purposes of income tax withholding—as follows:

> "If a person receives as remuneration for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished shall be added to the remuneration otherwise paid for the purpose of determining the amount of wages subject to withholding. If, however, living quarters or meals are furnished to an employee *for the convenience of the employer,* the value thereof need *not* be included as wages subject to withholding." (Emphasis added.)

The inconsistency in the treatment of employee meals and lodging for social security and unemployment tax purposes, as opposed to withholding tax purposes, even though the statutory basis for all three taxes—i.e., "wages"—was identical, was clearly set forth (without explanation for such inconsistency) by the Bureau in 1944 in Mim. 5657, 1944 Cum. Bull. 550, which held

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[15] See pp. 10-11, *supra.*

that although meals served employees for the convenience of their employers were not "wages" for withholding tax purposes, such meals were "wages" for FICA and FUTA tax purposes. Even so, S.S.T. 302, *supra,* issued in 1938, was left standing, which held that meals served employees for the convenience of their employer would *not* constitute wages for FICA and FUTA tax purposes.

The Government's handling of the question was even further confused by the issuance in 1957 of Revenue Ruling 57-471, 1957-2 Cum. Bull. 630, which, in attempting to reconcile S.S.T. 302, *supra,* Mim. 5657, *supra,* and the applicable Regulations, held that although meals served employees of a *bank or trust company* for the convenience of the employer would not constitute "wages" for FICA and FUTA purposes (see S.S.T. 302, *supra*), meals served employees of *food preparation establishments* (such as hotels, restaurants or cafeterias) for the convenience of their employers would constitute "wages" for FICA and FUTA tax purposes. Five years later, the Internal Revenue Service issued Revenue Ruling 62-150, 1962-1 Cum. Bull. 213, which revoked S.S.T. 302, *supra,* stating, without explanation, that although the convenience of the employer test was applicable for income tax purposes, it was "no longer" a test for FICA and FUTA tax purposes.[16] All of these changes in position

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[16] The Government seems to have again reversed its position only a few weeks ago in *Harris Trust & Savings Bank* v. *United States,* 81-1 USTC ¶ 9177 (Ct. Cls., January 16, 1981). In *Harris Trust,* the Treasury assessed FICA and FUTA taxes on the value of meals furnished employees in a company cafeteria in excess of nominal charges made for such meals by the employer. The Government later agreed, however, to the entry of judgment in favor of the

by the Treasury occurred during a period in which there was no change by the Congress in the applicable statutes.

C. The Government has recognized that "wages" has the same general meaning for all employment taxes.

It is also important for this Court to be aware of the Government's prior litigating position, in evaluating the Government's assertion, upheld by the court below, that the Government can override by administrative regulations and rulings the intent of Congress as to the meaning of wages.

Immediately prior to and during the pendency of this case, it was repeatedly recognized by the Government that the term "wages" had the same meaning for all employment tax purposes. In *Royster Co.* v. *United States,* 479 F.2d 387 (C.A. 4th, 1973)—a case which involved all four employment taxes—after specifically referring to the statutory definition of "wages" for FICA, FUTA and income tax withholding pur-

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employer for refund of such taxes based on a statement of facts "expressly accepted as the basis for its concession" which the parties agreed would be incorporated into an order of the court which could be applied for purposes of collateral estoppel to later taxable years. The significant facts as reflected in the court's order in *Harris* are that (1) the meals were provided primarily for the convenience of the employer; (2) there was no agreement with the employees to make such meals available; (3) they got no cash allowances if they refused such meals and were compensated fully for their services by means of ordinary cash wages; (4) they were not expected to render any services during meal times; and (5) the meals were made available on the same basis to all employees regardless of job category or compensation level. All of these circumstances apply to Rowan.

poses, the Government told the Fourth Circuit on brief that:

> "... For purposes of the Federal Insurance Contribution Act and the Federal Unemployment Tax Act, Section 3121(a) and 3306(b), respectively, define 'wages' as 'all remuneration for employment.' For purposes of the collection of income taxes at their source (withholding taxes), Section 3401(a) ... defines 'wages' as 'all remuneration ... for services performed by an employee.' In view of the similarity of these definitions, *we agree with the District Court's conclusion (R. 17) that the term 'wages' has the same meaning for all of the employment taxes involved.*" Gov't Brief, p. 6. (Emphasis added.)

In *Hotel Conquistador, Inc.* v. *United States,* 597 F.2d 1348 (Ct. Cl., 1979), *cert denied,* 444 U.S. 1032 (1980), involving the FICA and FUTA taxability of employee meals furnished for convenience of the employer, the Government sought to rely on the decision of the Seventh Circuit in *Central Illinois Public Service Co.* v. *United States,* 540 F.2d 300 (1976), later reversed by this Court, 435 U.S. 21 (1978), and urged the Court of Claims to suspend its proceedings in *Conquistador,* stating:

> "The Supreme Court's decision in the *Central Illinois* case will by necessity deal with the proper interpretation to be accorded the term 'wages' (i.e., the narrow *Royster* view or the broader *Central Illinois* definition), and as such, will have a direct impact on the instant case. Therefore, the proceedings in the instant case should be suspended pending the Supreme Court's decision in the *Central Illinois* case." [17]

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[17] Gov't. Motion for Suspension of Proceedings, filed Oct. 6, 1977, pp. 2-3.

When the Court of Claims declined to suspend the *Conquistador* proceedings, the Government filed a cross-motion for summary judgment and stated on brief:

> "Because . . . the term 'wages' has the same meaning under all the employment taxes, . . . [the decision of the Court of Appeals in *Central Illinois,* involving income tax withholding on meal reimbursements] is squarely in point here." [18]

The Government went on to state:

> "Because the proper definition of 'wages', and the reconciliation of the conflicting decisions, can be expected from the Supreme Court in *Central Illinois* prior to the Court's consideration of this case, we think any further discussion of this point at this time would be academic." [19]

Additionally, in the instant case, prior to this Court's reversal of *Central Illinois,* the Government advised the court below that *Central Illinois,* as "then pending before the Supreme Court . . . involved 'the same, substantially the same or related issues' as those involved in the present appeal." [20] Against this background, the Government's statement now made to this Court that

> " . . . this Court's decision in *Central Illinois Public Service Co.* does not bear upon the question presented in this case." [21]

cannot be given much credence.

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[18] Gov't Brief in Support of Cross-Motion for Summary Judgment, p. 22, fn. 8.

[19] *Id.* at p. 23.

[20] Gov't Motion for Extension of Time, March 28, 1978, p. 1.

[21] Brief for the United States on Petition for a Writ of Certiorari, p. 9.

III. The Court Below Erred In Finding That The Government Could Vary By Regulation The Meaning Of "Wages."

A. The court below failed to follow decisions of this Court.

The court below held that when Congress uses "the same words . . . in different statutes" [22] the regulatory interpretations of that word by the Government may be inconsistent" [23] and even "conflicting" [24] unless Congress affirmatively acts to prevent such interpretations. (Cert. App. A, 11a.) The court reasoned that the differing definitions could be justified "by the purposes of the statutes, the uses made of their revenues and their relationship with other statutes." (Cert. App. A, 9a.) Both this holding and reasoning of the court below as to the correct interpretation of the term "wages" conflicts with principles stated by this Court in *Social Security Board* v. *Nierotko,* 327 U.S. 358 (1946), and *Central Illinois Public Service Co.* v. *United States,* 435 U.S. 21 (1978).

In *Social Security Board* v. *Nierotko,* 327 U.S. 358 (1946), the Government also asserted that it could conclusively determine by regulation what was or was not "wages" for employment tax purposes. This Court refused to accept the Government's attempt to define the word "wages" for social security (FICA) tax purposes as having a meaning different from that ordinarily understood by such term, and held that the validity of regulations issued under the Social Security Act was specifically reserved for judicial determina-

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[22] Cert. App. A, 11a.

[23] *Id.*, 8a.

[24] *Id.*, 7a.

tion. *Id.* at 368. Of specific relevance to the instant case is the following statement by this Court:

> "Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. . . . Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretative power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function. Congress used a well understood word—'wages'— to indicate the receipts which were to govern taxes and benefits under the Social Security Act." 327 U.S. at 369.

Central Illinois Public Service Co. v. *United States,* 435 U.S. 21 (1978), dealt again with the definitional scope of "wages" for employment tax purposes. The Government argued that "wages" should be defined in "expansive and sweeping" terms and that the payments at issue, lunch payments of $1.40 per meal received by employees pursuant to a collective bargaining agreement,[25] "were a result of the employment rela-

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[25] The circumstances surrounding the furnishing of meals in *Central Illinois* are substantially similar to the facts herein:

> "The employee on travel status rendered no service to the Company during his lunch. He was off duty and on his own time. He was subject to call, however, as were all employees at any time as emergencies required. The lunch payment was unrelated to the employee's specific job title, the nature of his work, or his rate of pay. '[T]his lunch payment arrangement was beneficial and convenient for the company and served its business interest. It saved the company employee time otherwise spent in travelling back and forth as well as the usual travel expenses.' " 435 U.S. at 23.

tionship and were a part of the total of the personal benefits that arose out of that relationship", and therefore necessarily constituted "wages" for purposes of income tax withholding. 435 U.S. at 29.[26] This Court rejected such "expansive and sweeping definition of wages," finding it to be inconsistent with the Congressional purpose of setting forth an "intentionally narrow and precise" standard, chosen by Congress "in the interest of simplicity and ease of administration." 435 U.S. at 29, 31. It was emphasized that the tax base is limited to "wages" and that such term is limited by the withholding statute to mean "all remuneration . . . for services performed by an employee for his employer," 435 U.S. at 29, essentially the identical language of the FICA and FUTA statutes.[27]

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[26] In its brief to the Court of Appeals in *Central Illinois*, the Government stated (p. 10, fn. 4):

> "Normally, the determination that a payment is a *wage* results in the imposition of three distinct taxes: Federal Insurance Conributions Act taxes (Secs. 3111-3126), Federal Unemployment Act taxes (Secs. 3301-3311), and the employees' withheld income taxes (Secs. 3401-3404).
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> • • •
>
> Only withholding taxes are involved in this case because the Internal Revenue Service made an administrative determination that the employees who received meal money would have, in the vast majority of cases, earned more than $4,800, for 1963. Thus, it was for administrative convenience that no deficiency was asserted as to F.I.C.A. and F.U.T.A. taxes. . . ." (Emphasis added.)

In short, *Central Illinois* only involved income tax withholding because the Government elected not to pursue the FICA and FUTA taxes that would have been due had the Government's definition of "wages" been upheld by this Court.

[27] In reversing the Seventh Circuit in *Central Illinois*, this Court followed the earlier view of *Royster, supra*, 435 U.S. at 31. Al-

Despite its recognition of the essential identity of statutory language, and even acknowledging that "the factors considered in *Central Illinois Public Service* apply here as well", the court below refused to follow this Court's explicit directions as to the proper interpretation of "wages" in light of contrary Government regulations. In view of the Government's repeated acknowledgement of the identity of the issues, and recognition of the Seventh Circuit and the Court of Claims [28] of the applicability of *Central Illinois* to FICA and FUTA tax determinations, the failure of the court below to follow such decision is error.

B. There is no valid precedent for the holding of the court below.

The court below erroneously relied on *Pacific American Fisheries* v. *United States,* 138 F.2d 464 (C.A. 9th, 1943), and *S.S. Kresge Co.* v. *United States,* 218 F. Supp. 240 (E.D. Mich., 1963), and *S.S. Kresge Co.* v. *United States,* 379 F.2d 309 (C.A. 6th, 1967), as supporting the conclusion reached herein.

Pacific American Fisheries involved the characterization for social security tax purposes of board and lodging furnished cannery employees in Alaska during

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though reaching a different conclusion than *Royster* as to whether meal reimbursements were subject to tax, even the Seventh Circuit had itself agreed in *Central Illinois* with *Royster* that "wages" has the same meaning for FICA, FUTA and withholding tax purposes. 540 F.2d at 302, fn. 2.

[28] *Oscar Mayer & Co.* v. *United States,* 623 F.2d 1223, 1225-28 (C.A. 7th, 1980); *Hotel Conquistador, Inc.* v. *United States,* 597 F.2d 1348, 1351-52, 1354 (Ct. Cl., 1979), discussed at pp. 38-41, *infra.*

1937, 1938 and 1939. The employees had been paid wages at the rate of $90 per month and additionally, non-resident employees had been furnished meals "up to the value of $45 per man", plus lodging for time worked. 138 F.2d at 464-465. The Ninth Circuit noted as significant the fact "that some of the workers did not get board and lodging and that such workers received 'more money for the fish and more money for their labor,' " 138 F.2d at 466, and concluded:

> "This differential paid in cash to workers who resided in Alaska and who did not receive board and lodging strongly indicates that board and lodging were part of the wages and not merely for the convenience of the employer." 138 F.2d at 466.

Before reaching this conclusion, however, the court set forth as dictum this observation which the court below found as authority for its conclusion herein:

> " . . . It is possible that what might not be taxable income for income tax purposes might constitute wages under the provisions of the Social Security Act. There are no cases where a similar construction of the term 'wages' as appears in the income tax cases is made in determining wages for Social Security Tax purposes." 138 F.2d at 465.

While this may be literally true, the court ignored S.S.T. 110, 1937-1 Cum. Bull. 440, and S.S.T. 302, 1938-1 Cum. Bull. 456, discussed *supra,* p. 14, which specifically held the "convenience of the employer" test to be applicable to taxes imposed by the Social Security Act. It was unlikely that there would be any *cases* involving the issue so long as it was conceded by the Internal Revenue Service. Furthermore, while the court referred to the "convenience of the employer" test as

being made applicable by regulation for income tax purposes, but not for social security tax purposes, the court inexplicably ignored Regulation 90, Article 207, which specifically made the "convenience of the employer" test applicable for unemployment tax purposes.

In the first *Kresge* case, 218 F.Supp. 240, the question before the District Court was whether optional meals, made available only to those fountain department employees who were willing to wait on customers during their lunch period, constituted "wages" to those employees for FICA and FUTA tax purposes. Employees who were not willing to do so were required either to pay for their meals or eat elsewhere. The meals in question were held by the District Court to be taxable because they "constituted the *quid pro quo* or remuneration for the half hour meal period that the employees made themselves available and for the services they possibly would perform." 218 F.Supp. at 243-244. The District Court concluded:

> " . . . even if the 'convenience of the employer' doctrine applies to F.I.C.A. and F.U.T.A. taxes," the facts of the case at bar clearly do not bring it within such rule." 218 F.Supp. at 244.

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[29] The District Court erred when it cited *Southern Pac. Co.* v. *Joint Council Dining Car Employees*, 165 F.2d 26, 31-32 (C.A. 9th, 1947) as holding that the "convenience of the employer" test was not applicable to a determination of wages under § 3(m) of the Fair Labor Standards Act, 29 U.S.C.A. § 203(m). To the contrary, the Ninth Circuit, while citing the question raised in its earlier decision in *Pacific American Fisheries, supra*, as to whether the "convenience" test applied, held:

> ". . . it does not appear that such additional wage or price was paid primarily as a convenience to the Railway." 165 F.2d at 32.

In affirming the dismissal of the second *Kresge* case (379 F.2d 309) on authority of the first *Kresge* District Court decision, the Court of Appeals did not discuss the merits of the District Court's statement in the first case that the "convenience of the employer" test was inapplicable in FICA and FUTA tax cases. Instead, the Court of Appeals held that under existing FICA and FUTA tax regulations, there was a "presumption" that meals furnished were "generally" a part of "wages" for FICA and FUTA tax purposes, and that the *particular facts* in *Kresge* did not overcome this presumption. 379 F.2d at 310.

Pacific American Fisheries and the two *Kresge* cases, apart from being clearly distinguishable due to the compensatory character of the meals and lodging involved in those cases, fail this Court's mandate expressed in *Central Illinois* as to the proper interpretation of the term "wages". As noted by the Court of Claims in *Hotel Conquistador, Inc.* v. *United States,* 597 F.2d 1348, 1354 (Ct. Cl., 1979), *cert. denied,* 444 U.S. 1032 (1980):

> ". . . [the] 'presumption' of taxability [found by the *Kresge* Court of Appeals] . . . perhaps . . . was impossible to rebut because the court had not been taught to exclude from its analysis the broad and sweeping definition of 'wages', rejected in *Central Illinois.*"

C. The court below failed to recognize that the employee FICA tax is an income tax.

It is important to note when analyzing whether an item can be "wages" for FICA and FUTA taxes when it is admittedly not "wages" for income tax withholding, that the FICA tax imposed on the employee by

Section 3101 is an *income* tax.[30] The court below twice erroneously referred to the FICA tax on employees and employers alike as an "excise" tax (Cert. App. A, 3a, 4a), and the District Court in *Kresge* fell into the same error (218 F.Supp. 240, 243).

Section 801 of the 1935 Social Security Act, entitled (49 Stat. 646) "INCOME TAX ON EMPLOYEES", states:

> "In addition to other taxes, there shall be levied, collected, and paid upon the *income* of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date: . ." (Emphasis added.)

The current law, Section 3101(a) of the Internal Revenue Code of 1954 states:

> "In addition to other taxes, there is hereby imposed on the *income* of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—". . . (Emphasis added.)

This Court observed in *Central Illinois* that the concept of "wages" is narrower than that of "income"

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[30] The characterization of this tax was noted by the Court in *Helvering* v. *Davis*, 301 U.S. 619, 635 (1937):

> "Title VIII [social security] as we have said, lays two different types of tax, an 'income tax on employees,' and 'an excise tax on employers.' The income tax on employees is measured by wages paid during the calendar year. Section 801. The excise tax on the employer is to be paid 'with respect to having individuals in his employ,' and, like the tax on employees, is measured by wages. Section 804."

(435 U.S. at 25, 29-31), and it would seem clear that if meals and lodging furnished for the convenience of the employer are not income, as conceded by the Government, they necessarily are not "wages" subject to the FICA tax on income.

The mechanism for collecting the employee FICA tax is identical to that used for the income tax, namely, a withholding responsibility placed on the employer. The relevant employee FICA tax withholding provision states:

> "The tax imposed . . . shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." [31]

The relevant income tax withholding provision states:

> ". . . [E]very employer making payment of wages shall deduct and withhold upon such wages a tax . . ." [32]

As a result, the concern expressed by this Court in *Central Illinois* for precision and absence of speculation in determining the scope of the employer's income tax withholding responsibility,[33] is equally applicable to the employer's FICA tax withholding responsibility. The Government and the court below concede that the meals and lodging furnished by Rowan did not consti-

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[31] Section 802(a) of the Social Security Act of 1935 (49 Stat. 636), currently codified as Section 3102(a) of the Internal Revenue Code of 1954 (26 U.S.C.).

[32] Section 1622(a) of the Internal Revenue Code of 1939, as added by the Current Tax Payment Act of 1943 (57 Stat. 126), currently codified as Section 3402(a) of the Internal Revenue Code of 1954.

[33] 435 U.S. at 31-32.

tute income to the employees nor "wages" for purposes of income tax withholding. For the Government to assert, and the court below to find, that these same meals and lodging can nonetheless be income and "wages" so as to impose a withholding responsibility on Rowan for the employee FICA tax, defies logic.

D. The court below erroneously applied the "facilities or privileges" regulations.

The court below found that the meals and lodging in question were to be treated as FICA and FUTA tax "wages" by reason of the "facilities or privileges" regulations (Regulations § 31.3121(a)-1(f) and § 31.3306 (b)-1(f)). Throughout this case, the Government has argued,[34] and the court below implicitly agreed,[35] that these regulations are legislative in nature and therefore entitled to greater weight than ordinary interpretative regulations. To the contrary, the Government's authority to issue regulations relating to FICA and FUTA is derived from Sections 808 and 908 of the Social Security Act which have now been incorporated in Section 7805 of the 1954 Code without any change in meaning or scope.[36] Section 7805 simply authorizes the issuance of "all needful rules and regulations for the enforcement of this Title" (i.e., Title 26, the entire Internal Revenue Code). The authority thus given to the Treasury Department by the Congress to issue regulations with respect to the social security taxes is no different, and no broader, than the *interpretative* regu-

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[34] Gov't Brief to the Court of Appeals, p. 10; Brief for the United States On Petition, pp. 7-8.

[35] Cert. App. A, 5a.

[36] See, H.R. Rep. No. 1337, 83d Cong., 2d Sess. A324-A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 484 (1954).

lation authority of the Treasury Department with respect to the Internal Revenue laws in general."

The court below recognized that the regulations in question are both "conflicting" and "inconsistent" in their definition of "wages." As a result, it is inescapable that such regulations fail the test enunciated by this Court in *National Muffler Dealers Ass'n* v. *United States,* 440 U.S. 472, 488 (1979), that judicial acceptance of a regulation or the commissioner's interpretation of it is dependent upon a showing that it "implement[s] the congressional mandate in some reasonable manner' . . .". See also, *United States* v. *Cartwright,* 411 U.S. 546, 550 (1973). With respect to these regulations the Court of Claims in *Conquistador* stated:

> ". . . [A]s regards food and lodging furnished without charge, [the regulation provides that] they are not 'wages' unless they are 'remuneration,' and the regulation admits that not all food and lodging benefits are 'remuneration'. Only 'ordi-

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[37] In contrast to "interpretative" regulations, "legislative" regulations are issued pursuant to *express* statutory authority and are stated to be binding as a statute if they are (a) within the granted power, (b) issued pursuant to proper procedure and (c) reasonable. See, *Kramertown Co., Inc.* v. *United States,* 488 F.2d 728, 730 (C.A. 5th, 1974), citing K. Davis, *Administrative Law,* Section 503 at 299. Examples of the granting of such "legislative" regulatory authority can be found in I.R.C. Section 38(b), relating to the investment tax credit, *Kramertown Co., Inc.* v. *United States, supra,* Section 217(j), relating to deductible moving expenses, *Goldman* v. *Commissioner,* 497 F.2d 382, 383 (C.A. 6th, 1974), and Section 1502, relating to filing consolidated returns, *Wolter Construction Co., Inc.* v. *Commissioner,* —— F.2d ——, 1980-2 USTC § 9799, 46 AFTR 2d 80-6089 (C.A. 6th, 1980). There is no comparable grant of "legislative" regulatory authority in the employment tax sections pertinent herein. See *Social Security Board* v. *Nierotko,* 327 U.S. 358 (1946), discussed at pp. 21-22, *supra.*

> narily' and 'generally' they are. . . . The employer who concludes subjectively that his free meals are not 'remuneration,' will not find anything in the regulation to tell him whether he is right or wrong on the particular facts of his case. . . . The employer has no way of telling whether or not his plan is the ordinary or general case, except language that seems to intimate the regulator is thinking of rather massive benefits. . . . The concluding part of the quoted regulation would tell him to compare the food or lodging benefits with the 'total remuneration,' but he is not told what ratio will trigger a classification one way or the other; i.e., what part the regulator deems an 'appreciable' part. . . .
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> "Viewed as a hunting license to authorize IRS agents to flush up additional revenue from employers, the regulation is brilliantly conceived. As a guide to employers in their relations with employees, it is nearly worthless." 597 F.2d at 1353-1354.

The uncertainty engendered by the regulations has been intensified by the fact that the Government has changed its published position on the subjectability to FICA and FUTA taxes of meals served for the convenience of the employer *no less than five times,* notwithstanding the absence of any change whatsoever in the applicable statutes.[38] The regulations and rulings

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[38] Compare Regulations 90, Article 207 (1936) (meals for the convenience of the employer *not* treated as wages); S.S.T. 110, 1937-1 Cum. Bull. 440 (same); S.S.T. 192, 1937-2 Cum. Bull. 449 (such meals treated as wages); S.S.T. 302, 1938-1 Cum. Bull. 456 (such meals *not* treated as wages); Regulations 106, § 402.227, and Regulations 107, § 403.227 (1940) (such meals "ordinarily" treated as wages); Mim. 5657, 1944 Cum. Bull. 550 (such meals treated as wages); Rev. Rul. 57-471, 1957-2 Cum. Bull. 630 (such meals served bank employees *not* treated as wages, such meals served other employees treated as wages); and Rev. Rul. 62-150, 1962 Cum. Bull. 213 (meals generally treated as wages).

interpreting the FICA and FUTA statutes are inconsistent and for that reason alone fail the test of "continuity without substantial change" regarded by this Court as essential in order that they be considered as having Congressional approval and the effect of law. *United States* v. *Correll,* 389 U.S. 299, 305-06 (1967), cited by the court below, Cert. App. A, 10a-11a. Off and on for approximately 26 years, from the issuance of Regulations 90 in 1936, followed by S.S.T. 302, *supra,* until its revocation without explanation in Rev. Rul. 62-150, *supra,* the Government specifically recognized the convenience of the employer test as being applicable to a determination of FICA and FUTA "wages." As late as 1957, the Government stated in Revenue Ruling 57-471, *supra,* that the convenience test applied so as to exclude from FICA and FUTA "wages" meals served employees of a bank or trust company. Yet from 1940 on, the language of the "facilities or privileges" regulations, found by the court below to preclude the convenience test, has been substantially unchanged, a fact that calls into serious question both the validity of the Government's present position and the decision of the court below as to the applicability and controlling effect of these regulations. This inconsistency between the regulations and the rulings also provides considerable basis for the Court of Claims' observation in *Conquistador* that "[a]s a guide to employers in their relations with employees, [the regulations are] nearly worthless." 597 F.2d at 1354.

E. The court below erroneously ignored other, applicable regulations.

The holding of the court below fails to take into account other regulations that are directly in point and which compel a contrary conclusion as to the treat-

ment of meals and lodging "furnished in kind by an employer for his own benefit to employees away from home overnight." [39]

FICA Regulation § 31.3121(a)-1(h) and FUTA Regulation § 31.3306(b)-1(h) provide:

> "Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages."

The income tax withholding regulation contains identical language. See Reg. § 31.3401(a)-1(b)(2), App., *infra*, p. 5a.

The Internal Revenue Service has recognized that expenses incurred directly by an employer which, if paid by his employees would be deductible by such employees as ordinary and necessary travel expenses, "are not 'wages' for purposes of Federal employment taxes," specifically including FICA, FUTA and income tax withholding. Rev. Rul. 76-71, 1976-1 Cum. Bull. 308.[40]

Under Section 162(a)(2) of the Internal Revenue Code a deduction is allowed for

> "[T]raveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circum-

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[39] See Cert. App. A, 1a.

[40] It is not clear why the Internal Revenue Service is willing to recognize the non-FICA and FUTA taxability of such items solely on the basis that such items would be deductible by the employee, but would not do so here when the meals and lodging at issue have the exact same income tax effect to the employee.

> stances) while away from home in pursuit of a trade or business."

In justifying deductions under this section for expenses overnight, this Court has pointed out that "the statute speaks of 'meals and lodging' as a unit," and that an employee gains only limited benefit from such expenses if he must also "maintain a home for his family at his own expense even when he is absent on business." *United States* v. *Correll,* 389 U.S. 299 at 304-305. The principle of allowing a deduction (or exclusion if the expense is paid directly by the employer) is particularly applicable here where as a matter of practical necessity, an employee working offshore, cannot return home at night until his 10-day tour ends, but must nevertheless in the meantime, maintain living quarters on shore available for use between tours.[41] See, in this connection, Revenue Rulings 54-497, 1954-2 Cum. Bull. 75; 75-432, 1975-2 Cum. Bull. 60; and 75-168, 1975-1 Cum. Bull. 58, applying such principle to railroad employees eating and sleeping aboard trains and truck drivers on long-haul overnight trips. Thus, the meals and lodging furnished Rowan's offshore employees are properly excludible from "wages" for FICA and FUTA tax purposes by Regulations § 31.3121(a)-1(h) and § 31.3306(b)-1(h) and Revenue Ruling 76-71, *supra,*—regardless of what the "facilities or privileges" regulations (Reg. §§ 31.3121(a)-1(f) and 31.3306(b)-1(f)) relied on by the court below might seem to say.

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[41] Although paid substantially the same cash wages as crew members on offshore rigs, crew members on Rowan's land-based rigs, who went home each day, were not furnished meals or lodging (J.A. 69a-70a, 47a-48a, 53a).

F. The decision of the court below allowing "inconsistent" and "conflicting" interpretations of "wages" is erroneous.

The reasoning of the court below that, in the absence of a specific Congressional prohibition, the Government is free to interpret the term "wages" "inconsistent[ly]" and "conflicting[ly]" as between various sections of the Internal Revenue Code is error because it fails to take into account a clear Congressional intent that "wages" be construed the same for all employment taxes.[42]

As was noted previously,[43] the Congressional purpose in using the term "wages" was to:

> "simplify the process of collection at the source and help to minimize the requirements for additional business machines by employers charged with the duty of collecting and accounting for the tax." S. Rep. No. 1631, *supra* (1942), at 171.

The court below disregarded this statement of Congressional purpose, and stated:

> "Ease of administration and uniformity of interpretation, even if not icons, merit consideration. Yet most businesses *today* utilize computers to calculate taxes and it is a simple matter to devise a program that includes some items for one or two taxes and excludes the same items in calculating others." Cert. App. A, 11a. (Emphasis added.)

In this regard, it is appropriate to note that in the taxable years here involved—1967, 1968, and 1969—far fewer employers had computers to calculate taxes than today, and many still do not. But, more important,

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[42] See pp. 10-11, *supra*.

[43] See p. 11, *supra*.

there were no computers for calculating taxes in 1942 when Congress deliberately chose the same word "wages" as the base for all employment taxes; whether Congress would have made the same decision today is irrelevant in light of the fact that it has never seen fit to overturn that decision, and its intent in enacting the statute should be given primary weight in applying the statute.

It is also clear that great difficulty will be encountered in determining the value of meals and lodging, placing an extremely heavy burden on the employer if it is to be fair to individual employees in determining the amounts on which the employee FICA tax must be withheld and the employer FICA and FUTA taxes paid.[44] Again, in describing income tax withholding, the Conference Report in 1943 said in referring to the bill which Congress adopted:

> ". . . [T]he methods of collection, payment, and administration of the withholding tax were coordinated generally with those applicable to the Social Security tax imposed on employees under section 1400 of the code. This proposal was made in order to facilitate the work of both the Government and the employer in administering the withholding system." H.R. Rep. No. 510, 78th Cong., 1st Sess. (1943), at 28.

The decision of the court below, allowing the Government to define "wages" with "inconsistent" and "con-

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[44] Aside from the problem of determining the value of food and lodging furnished under conditions where commercial facilities are totally unavailable, it should be noted that over the course of the year some employees may eat entirely different items and entirely different quantities than other employees; some may sometimes bring their own food; and some may follow different practices some days than others.

flicting" meanings places unwarranted and unjustifiable burdens on the administration of the employment tax system.

IV. The Courts Of Appeals For The Fourth And Seventh Circuits And The Court Of Claims Have Correctly Decided The Issues In This Case.

The court below recognizes that its decision permitting the Government to vary by regulation the definition of "wages" is directly contrary to the recent decisions of the Fourth Circuit in *Royster Co.* v. *United States,* 479 F.2d 387 (1973), and the Seventh Circuit Circuit in *Oscar Mayer & Co.* v. *United States,* 623 F.2d 1223 (1980), which both held that "the term 'wages' has the same essential meaning in the [income tax] withholding, FICA and FUTA tax statutes." (Cert. App. A, 8a, 11a.)

The court below also recognizes that its decision conflicts with the holding of the Court of Claims in *Hotel Conquistador Inc.* v. *United States,* 597 F.2d 1348 (1979), *cert. denied,* 444 U.S. 1032 (1980), that cafeteria meals furnished hotel employees for the convenience of the employer were not remuneration and therefore not "wages" for FICA and FUTA tax purposes (Cert. App. A, 11a).

Royster, as discussed previously,[45] is initially significant because of the concession by the Government on brief in that case that "the term 'wages' has the same meaning for all of the employment taxes involved." *Royster* involved the question of whether meal reimbursements constituted "wages" to employees for purposes of FICA, FUTA, and income tax withholding.

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[45] See p. 18, *supra.*

Quoting the definition of "wages" contained in the FICA, FUTA and withholding statutes, the Fourth Circuit stated:

> "§ 3121(a) defines 'wages' within the meaning of §§ 3101 and 3102 as 'all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.' Concerning FUTA, 26 U.S.C. § 3306(b) likewise defines 'wages' as 'all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.' For the purposes of withholding income tax by the employer, 26 U.S.C. § 3401(a) defines wages: 'For purposes of this chapter, the term 'wages' means all remuneration for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash.' The district court was properly of opinion that the slight variations in the wording of the above statutes were inconsequential and that wages has the same essential meaning under all the statutes here in question. The government in its brief agrees with this determination.
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> * * *
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> "We are of opinion that the term wages is narrower than the term income as used in the income tax provisions relating to how an individual must treat payments to him. Wages are merely one form of income.
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> * * *
>
> "We believe that the question here is whether the payments at issue were made to the employees of Royster as remuneration for services performed.
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> * * *
>
> "We conclude, therefore, that the payments in question here were not wages as that term is used

in the FUTA and FICA and income tax withholding statutes." [46] 479 F.2d at 390, 392.

In *Oscar Mayer,* the Seventh Circuit had before it the question of whether the unreimbursed value of the personal use of company cars by employees constituted "wages" for purposes of FICA and FUTA taxes. The Government had conceded that such personal use value was not "wages" for income tax withholding purposes but contended that such value was nevertheless "wages" for FICA and FUTA purposes. In reliance on this Court's approval of the Fourth Circuit's decision in *Royster,* 623 F.2d at 1226, the Seventh Circuit denied the Government's attempt to treat such an item inconsistently for employment tax purposes, stating:

> "The seemingly inconsequential differences in statutory language belie an assertion that Congress intended to adopt broad policy differences in establishing the various withholding programs. Since there has been no showing by the Government to the contrary, we conclude that Congress' use of

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[46] The suggestion by the Government in its Brief on Petition for a Writ of Certiorari herein (p.10, fn.9) that the *Royster* decision was based on an analysis of IRS regulations other than those relied on herein is completely without foundation. The analysis in the opinion of the District Court (342 F. Supp. 375 at 376), in the Government brief referred to by the court (Gov't Brief, p.6), and in the opinion of the Court of Appeals (479 F.2d at 390) is in each instance based entirely on the language of the statutes without any mention of such "other" regulations. The only regulations even referred to in the Government's brief in *Royster* are the *same* "facilities or privileges" regulations it relies on here. (Gov't Brief, pp. 7-8, 23-24).

> the term 'wages' in both contexts reflects an intent that the term be construed for FICA and FUTA purposes congruently with the manner *Central Illinois* prescribes for the income tax provisions." 623 F.2d at 1227.

The decision of the Court of Claims in *Hotel Conquistador,* holding that meals furnished employees for the convenience of their employer were not "wages" for FICA and FUTA tax purposes, has been previously before this Court on the Government's petition or a writ of certiorari, denied at 444 U.S. 1032 (1980). The Court of Claims found that such meals did not constitute "remuneration" to the employees and therefore could not be "wages", 597 F.2d at 1350, a finding based on the analysis of the court as to whether the employer furnished the meals "primarily to effectuate his own policies or to sweeten the pot for employees," 597 F.2d at 1353. The court refused to accept the Government's assertion that the "facilities or privileges" regulations relied on by the court below compelled a contrary conclusion. 597 F.2d at 1353-1354.

Royster, Oscar Mayer, and *Hotel Conquistador* were correctly decided by their courts and reflect a clear understanding of the teaching of this Court in *Central Illinois* that the term "wages" is an even narrower tax base than "income" and of the clearly expressed Congressional intent that such term be consistently construed for all employment taxes. The acknowledged failure of the court below to follow the holdings and rationale of those cases is error.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.) (1971):

SECTION 3101. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance* —

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) —

• • •

(b) *Hospital Insurance* — In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) —

• • •

SECTION 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement* — The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. . . .

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SECTION 3111. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance* —

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) —

• • •

(b) *Hospital Insurance* — In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) —

• • •

SECTION 3121. DEFINITIONS.

(a) *Wages* — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

• • •

SECTION 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

• • •

SECTION 3306. DEFINITIONS.

(b) *Wages* — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

• • •

SECTION 3401. DEFINITIONS.

(a) *Wages* — For purposes of this chapter, the term "wages" means all remuneration (other than fees paid

to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; . . .

• • •

SECTION 3402. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding* — Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. . . .

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Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.) (1971):

§ 31.3121(a)-1 *Wages.*

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

• • •

(h) Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reason-

ably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

• • •

§ 31.3306(b)-1 *Wages*

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

• • •

(h) Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

• • •

§ 31.3401(a)-1 *Wages*

(b) *Certain specific items* —

(2) *Traveling and other expenses.* Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

• • •

(9) *Value of meals and lodging* — The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See § 1.119-1 of this chapter (Income Tax Regulations).

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